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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 1086 95

THE PEOPLE OF THE STATE OF ILLINOIS on relation of THE MOODY BIBLE INSTITUTE OF CHICAGO, a corporation not for profit, Appellant, vs. CITY OF CHICAGO, a municipal corporation, et al., Appellees.	Appeal from the Supreme Court of Illinois No. 26665.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM and ALTERNATIVE PRAYER FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

The appellant, The Moody Bible Institute of Chicago, a corporation not for profit, hereby respectfully presents its reply to appellee's statement against jurisdiction and its motion to dismiss or affirm, served on appellant April 19, 1943:

As pointed out in appellant's jurisdictional statement (R. 43) and in the opinion of the Illinois Supreme Court,

appealed from herein (R. 46), the constitutional questions which appellant contends confer jurisdiction upon this Court on this appeal, were first raised in the trial court and subsequently urged in both the State Appellate and Supreme Courts. Appellee concedes (R. 68) "that from the very outset the appellant has asserted a Federal question."

In the State Appellate Court appellant contended that said court was without jurisdiction to pass upon the constitutional questions involved herein. After that court overruled appellant's contention on that point and rendered its decision, appellant filed a petition for leave to appeal in the State Supreme Court for a review of the decision of the Appellate Court. Upon the denial of said petition for leave to appeal appellant sought to avail itself of its right to a review of the Appellate Court judgment in the State Supreme Court by writ of error, as provided by Sec. 11 of Art. VI of the Illinois Constitution.

One of the contentions of appellant on this appeal is that the eminent domain provisions of the Illinois Local Improvement Act (1941 Ill. Rev. Stats. Ch. 24, Sec. 84-1 to 84-99), as construed by the courts below, are invalid in that they violate appellant's constitutional guarantees under Sec. 1 of the Fourteenth Amendment to the Federal Constitution. Sec. 11 of Art. VI of the Illinois Constitution provides that appeals and writs of error shall lie from the appellate courts to the State Supreme Court in cases where the validity of a statute is involved. Until the State Supreme Court passed upon appellant's right to a review of the Appellate Court judgment there was no final and appealable judgment or decree terminating the litigation between the parties on the merits of the case, of which this Court could take jurisdiction (*Georgia Ry. v. Decatur*, 262 U. S. 432, 437.)

I.

To satisfy the due process provision of the Federal Constitution in Eminent Domain proceedings, not only must a fair and adequate hearing be provided for the ascertainment of just compensation to be paid the owner for the property taken or damaged, but the compensation, when the amount thereof is determined, must actually be paid.

The condemnation proceeding wherein the amount of compensation due appellant herein was determined, was concluded on November 28, 1930 (R. 22). Since that time, for a period of almost 13 years, appellee has consistently refused to pay appellant the principal sum of $365,782, and interest thereon, due under said condemnation award. There is no meritorious or legal excuse for the withholding of this portion of the compensation found to be due appellant. Appellee contends, however, that it is justified in refusing to pay the balance of appellant's award because appellant has failed to perform its part of a certain stipulation.

Before the amount of the award was determined in the trial court appellant agreed to remove a portion of its buildings from the property condemned or "to submit to the Board of Local Improvements (of the city of Chicago) a *bona fide* contract for their removal" (R. 23). This agreement, which appears on pages 16 to 21 of the printed abstract of record (R. 3), was not filed in the condemnation proceeding and formed no part of the judgment award entered therein nor was it even mentioned or referred to in the condemnation judgment. Within a short time after the agreement was made, appellant complied with its terms by submitting a *bona fide* contract for the removal of the buildings in question to the said Board of Local Improvements. This contract, which appears on pages 70

and 71 of the printed abstract of record (R. 3), was produced by appellee from its own files and introduced in evidence by appellee in the trial court. There is no denial regarding the prompt and proper submission of the contract to the Board, nor is there any question as to its being *bona fide*. Appellant's complete compliance with the terms of the agreement therefore stands admitted, and no legal or equitable reason exists, under which appellant's conduct, in refusing to pay the balance of the award, can be excused.

Appellant's contention that this court has jurisdiction of this appeal under Section 237 of the Judicial Code of the U. S. (28 U. S. C. A., Sec. 344) is based on the following theory:

(1) The decision appealed from is a final judgment rendered by the highest court of the State of Illinois in which a decision in the suit could be had;

(2) In the courts below, there was properly raised and presented a question as to the validity of the eminent domain provisions of the Illinois Local Improvement Act (1941 Ill. Rev. Stats., Chap. 24, Sec. 84-1 to 84-99), on the ground of their being repugnant to the due process clause of the Federal Constitution, and the decision was in favor of their validity.

Appellant does not complain that it failed to obtain a hearing in the condemnation proceeding, nor does it question the sufficiency of the amount adjudged by the trial court to be its just compensation for the property taken and damaged. It does contend however, that the refusal of the appellee never to pay the full amount of appellant's award constitutes a denial of due pro-

cess under the Federal Constitution. If a State law, which confers the power of eminent domain upon municipalities, lends itself to a construction permitting such an evasion of the full payment of the award allowed, then such law must be unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution. The courts below having decided in favor of the validity of the eminent domain provisions of the State Local Improvement Act in this respect, the case is properly before this court on appeal.

This court has held that where a judgment of a State court authorizes the taking of private property for public use without the payment of just compensation, the affirmance of such judgment by the highest court of the State is a denial of the right secured to the owner by the due process clause of the Federal Constitution. *Chicago, etc. R. Co.* v. *Chicago,* 166 U. S. 241.

It has also been held by this Court that to satisfy the due process provision of the Federal constitution, proper and adequate provisions must be made for just compensation to be *paid* to the owners of the property affected. *Cincinnati* v. *Louisville etc. R. Co.,* 233 U. S. 390; *U. of So. Cal.* v. *Robbins,* 295 U. S. 738.

In its motion to dismiss, appellee argues that the constitutional requirements of due process were complied with in this case, because appellant was afforded an adequate hearing in the condemnation proceeding and was awarded an ample sum for the damages it sustained. The matter of payment of the award is treated by appellee as a separate and distinct element, unrelated to the taking and damaging of appellant's property. The fallacy of this argument is clear, for the taking or damaging of private

property in a condemnation proceeding and the payment of the damages awarded the property owner therefor, constitutes a single, inseparable transaction. The three essential elements are (1) a proper hearing; (2) an adequate award for the damages sustained; and (3) a prompt payment of the award. Of what value is a proper hearing and an adequate award if the award is never paid? The lack of this indispensable element creates a mockery and a sham out of the whole proceeding and results in the taking of property without due process of law contrary to the provisions of the Federal constitution.

Because the eminent domain provisions of the Illinois Local Improvement Act, as construed by the Illinois Supreme Court permit such an evasion of a payment of a judgment award in a condemnation proceeding, they are invalid in that they violate Sec. 1 of the Fourteenth Amendment to the Federal Constitution.

ALTERNATIVE PRAYER FOR WRIT OF CERTIORARI.

A further violation of appellant's constitutional rights arose out of the rulings of law upon the evidence herein.

Appellee bases its entire defense upon two documents, *i.e.* (1) a stipulation, entered into between appellant and appellee before the entry of the judgment award providing (a) for the removal by the appellant of a portion of the buildings on the land condemned, or (b), *"the submission to the Board of Local Improvements of a bona fide contract for their removal"*; and (2) the said contract for the removal of said buildings. Both of these documents were introduced in evidence by the appellee after being produced from its files. The stipulation appears on pages 16 to 21, and the contract on pages 70 and 71 of the printed abstract of record (R. 3). An examination of these two documents makes it clearly obvious that the submission of the contract to the Board constituted a full compliance with the terms of the stipulation on appellant's part. Furthermore, there is no denial of this by the appellee.

In the decision appealed from herein, the Illinois Supreme Court states:

> "It is conceded that if no stipulation had been entered into, the taking of property without paying the full amount of the condemnation judgment would have been a violation of the constitutional rights of the plaintiff in error." (R. 46).

Although appellant's first contention is that the payment of a judgment award of the type here involved cannot be evaded without a violation of due process of law, it fur-

ther contends that, inasmuch as there has been a full compliance on its part with the terms of the stipulation, no justification for appellee's refusal to pay the award can possibly exist. Although the contract for the removal of the buildings, the submission of which constituted performance on appellant's part, is a part of appellee's own evidence, it is not even metioned in appellee's motion to dismiss. Nowhere in its motion does appellee deny or answer appellant's contention, set forth on pages 6 and 7 of its jurisdictional statement (R. 41, 42), that it had fully complied with its agreements under said stipulation. It is obvious, therefore, that the defense of non-compliance with the terms of the stipulation has not been proved and is not made in good faith and that said stipulation is no defense to this action of mandamus based on the condemnation judgment.

Appellant contended in the courts below, and still contends, that the stipulation in question was inadmissible to vary the terms of the final and unconditional condemnation judgment and that any agreements entered into prior to the entry of said judgment were merged therein. For this reason appellant objected to the introduction of the stipulation and contract in evidence by appellee in the trial court. Inasmuch however as the two documents clearly show a full compliance under the stipulation on appellant's part, there is no evidence in the record to support appellee's defense.

Further proof of appellant's compliance with the terms of the stipulation can be found in the testimony of one of appellee's own witnesses, Michael J. Faherty, who testified (pp. 30-61 of the printed abstract of record, R. 3) that he was the president of the Board of Local Improvements when the contract for the removal of the buildings

was submitted; that he had charge of the negotiations to settle the case and signed the stipulation; that he received the contract on December 30, 1930, and considered it as "the carrying out of the agreement (stipulation) that was entered into"; that he received it "in connection with the settlement of the claims against the City for that property."

The stipulation, being in the alternative, *i.e.*, permitting appellant *either* to remove the obstructions *or* to furnish a contract for their removal, was complied with by appellant when it submitted such a contract. This is the well settled law in Illinois as well as elsewhere. (*Sperry & Co.* v. *Siegel Cooper*, 309 Ill. 193, 200; *Brockton Co.* v. *Lee*, 266 Mass. 550, 556.

There is no evidence in the record to support the ruling of the lower courts to the effect that the stipulation barred appellant's right to collect its judgment in full. In ruling to the contrary, the courts below therefore prevented appellant from obtaining just compensation for its property. This constituted a violation of appellant's rights to an equal protection of the laws, as well as of its right to due process of law under the Fourteenth Amendment.

This court has held that where a finding of fact is not supported by any evidence, as in the present case, and the finding deprives appellant of a constitutional right, the Supreme Court will review the record. *Interstate Amusement Co.* v. *Albert*, 239 U. S. 500; *Truax* v. *Corrigan*, 257 U. S. 312; *Kansas City Southern R. R. Co.* v. *C. H. Albers Co.*, 223 U. S. 573.

In the decision handed down by former Chief Justice Taft in the *Truax* case, this Court (at p. 324) established the rule that:

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

In *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261, former Chief Justice White said:

> "While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision * * *."

Northern Pacific R. R. v. *North Dakota*, 236 U. S. 585, 593; and *Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, are to the same effect.

Appellant therefore prays that, in the event that this Honorable Court finds that the record and pleadings herein fail to disclose a jurisdictional question reviewable by this court on appeal, the case may then be considered as an application for a writ of certiorari and that appellant be allowed reasonable time within which to file its brief in support thereof.

Respectfully submitted,

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